IN THE

Supreme Court of the United States

October Term, 1949

No. 178

J. BAKER BRYAN, SR., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR THE PETITIONER.

CARL J. BATTER
910 Seventeenth Street, N. W.
Washington 6, D. C.
Attorney for the Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

TABLE OF CASES.

STATUTES AND RULES.

IN THE

Supreme Court of the United States

October Term, 1949

No. 178

J. BAKER BRYAN, SR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR THE PETITIONER.

The respondent in its brief urging the affirmance of the judgment by the court below, appears to rely upon the following points:

I. That the judgment of the court below does not violate the petitioner's constitutional right against double jeopardy;

II. That petitioner's right to a judgment of acquittal is a temporary right that rested solely in the judgment of the trial court, and that upon denial of the motion for judgment of acquittal by the trial court such right lapsed and reposed in the bosom of the court below a discretion not available to the trial court;

III. That Rule 29(b) permits the trial court and the appellate court the same discretion that is contained in Rule 50(b) of the Federal Rules of Civil Procedure;

IV. That a remand with direction for a new trial is "just" and "appropriate"—the language used in Section 2106, Title 28, U. S. C.—despite the mandate contained in Rule 29(a).

I.

Double Jeopardy.

The respondent cites numerous cases before and since the decision of this Court in *Trono* v. *United States*, 199 U. S. 521, decided in 1905, and quotes from that case in support of its position that there is no double jeopardy. However, a careful reading of the quoted language (Br. 11) at once makes it clear why that case and the whole line of decisions preceding and following it are not authority in the case at bar.

That double jeopardy exists on remand for a new trial is conceded by the line of decisions relied on by the respondent; however, it has been consistently held, as stated in the quotation:

> "* * * that by appeal he [the defendant] waives his right to the plea, *and asks the court to award him a new trial*, although its effect will be, if granted, that he will be again tried for the offense of which he has been once convicted. * * *" (Italics supplied)

The protection against double jeopardy is waived by seeking a new trial. Here, however, the facts are different.

The petitioner presented two pleas to the appellate court: one, for a review of the denial of the motion for judgment of acquittal; and the other for a new trial. The issues inherent in a new trial were not reached—the court below decided the case on the issue that would have resulted in a judgment of acquittal had the trial court correctly evaluated the evidence presented.

Prior to the Federal Rules of Criminal Procedure (effective March 21, 1946) it was considered the function of the jury to render a verdict, and the trial court could go no further than direct the jury to bring in a verdict of acquittal. Now, however, the trial court "shall" without the intervention of a jury, enter a judgment of acquittal "if the evidence is insufficient to sustain a conviction". (Rule 29(a))

The distinction is obvious. Here, it was not necessary to ask the appellate court for a new trial—prior to the new rules it was. Here the action of the trial court on the motion for judgment of acquittal was presented for review, and that plea required no waiver of the constitutional rights—it did not require the asking for a new trial. The issue, under the rule, was out of the hands of the jury—the court was compelled to act.

Prior to the new rules, since the action was taken through the jury in the form of a directed verdict, the appellant had no recourse but to ask for a new trial and that involved a waiver of the constitutional right against double jeopardy.

The impediment heretofore existing on appeal has been vitiated by the rule compelling the court to enter a judgment of acquittal upon the finding that the evidence was insufficient to sustain a conviction. That finding is a matter of law and is reviewable. It has been reviewed and the trial court was found to have committed error. The remaining issues directed to a new trial were not reached—indeed it was not necessary to reach them in view of the decision reached by the court below.

It is significant that the respondent has not been able to point to a single case decided since the Federal Rules of Criminal Procedure became effective that follows the old line of decisions upon which it relies.

Double jeopardy exists and we rely on this Court to correct the error contained in the judgment of the court below.

II.

Judgment of Acquittal Not a Temporary Right.

The respondent appears to argue that petitioner's right under paragraph (a) of Rule 29 was a temporary right that lapsed upon the trial court committing error. He italicizes "if in the judgment of the trial court" in its brief (p. 26), although a perusal of the rule shows no such limitation. The rule, to the extent pertinent, reads:

> "The court * * * shall order the entry of judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense * * *."

The rule does not leave the matter to the discretion of the court—the word "shall" requires the court to enter a judgment of acquittal. The sufficiency or insufficiency of the evidence is a matter of law for the court to decide and a matter of law is reviewable. The rule does not, as the respondent argues, leave the matter to the "judgment of the trial court". If the rule were intended to be a rule applicable solely to the trial court it would have been easy enough to say so.

The Third, Seventh and Ninth Circuits have had no difficulty in following the rule and in each case have remanded with directions to enter a judgment of acquittal. *United States* v. *Bozza* (3 C. C. A.) 155 F. 2d 592, affirmed in part and reversed in part 330 U. S. 160; *United States* v. *Renee Ice Cream Co.* (3 C. C. A.) 160 F. 2d 353; *United States* v. *Johnson* (3 C. C. A.) 165 F. 2d 42, certiorari denied, 333 U. S. 852; *United States* v. *Gardner* (7 C. C. A.) 171 F. 2d 753; *Karn* v. *United States* (9 C. C. A.) 158 F.

2d 568. The respondent cannot point to a single case under the Federal Rules of Criminal Procedure where, upon reversal for insufficiency of the evidence, a new trial was had.

There is no indication whatsoever in the rule that the right to a judgment of acquittal is a temporary right that lapses upon the trial court's denial of the motion. There is no indication whatsoever that it is the judgment of the trial court alone that controls the right of the petitioner to a judgment of acquittal.

We submit that a reviewing court, upon finding the state of facts set forth in the rule, is bound by the positive action set forth in the rule just as much as is the trial court, and that the right to a judgment of acquittal is not lost if the reviewing court finds the facts set forth in the rule—that is, "if the evidence is insufficient to sustain a conviction of such offense".

III.

Comparison of Rule 29(b) Federal Rules of Criminal Procedure with Rule 50(b) of the Federal Rules of Civil Procedure.

The respondent points to Rule 50(b) of the Federal Rules of Civil Procedure and contends that that rule is in substance similar to Rule 29(b) of the Federal Rules of Criminal Procedure, and then quotes from this Court's decision in *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, construing that rule in a civil case (Br. 30).

The quotation from this Court's decision in *Cone* v. *West Virginia Paper Co.* (supra) appears to rest upon a discretion lodged in the court to choose between two alternatives. That the court has a discretion under Rule 50(b) is gleaned from the "either-or" language contained in the rule. No such language appears in Rule 29(b) and the discretion relied upon in the civil rule does not exist under the criminal rule. A comparison of the penultimate sentence in each rule follows:

Civil Rule 50(b):

> "If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and *either* order a new trial *or* direct the entry of judgment as if the requested verdict had been directed." (Italics supplied)

Criminal Rule 29(b):

> "If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal."

We do not think the criminal rule permits the discretion contained in the civil rule. It is to be borne in mind however that paragraph (b) of the rule requires consideration only if this Court should hold that the petitioner is not entitled to a judgment of acquittal under paragraph (a) of the rule.

IV.

Is a New Trial "Just" and "Appropriate"?

The respondent argues that the court below rendered a judgment that was both "just" and "appropriate" within the purview of Section 2106 of Title 28, U. S. C. Assuming arguendo, that the court below is correct in looking to that section for its authority, can it be said that a judgment that denies the petitioner the relief that would have been his had the trial court ruled correctly under Rule 29(a) is both just and appropriate? We think not.

The trial court, if it had ruled correctly on the motion for judgment of acquittal at the close of all the evidence (R. 206), would have been compelled under Rule 29(a) to enter a judgment of acquittal. Can any lesser relief be considered "just" and "appropriate" because the trial court committed error?

The right to a judgment of acquittal matured at the close of all the evidence. That right is the only "just" and "appropriate" right whether it be granted within the purview of Rule 29(a) or Section 2106 of Title 28, U. S. C.

Conclusion.

The respondent in its brief (pp. 10, 39) contends that it has additional evidence that can be produced at a new trial. Let us point out that the record is void of any such evidence or any reason why it was not advanced at the trial.

WHEREFORE, because of the errors committed, your petitioner respectfully prays that the judgment of the Court of Appeals for the Fifth Circuit be modified to direct a judgment of acquittal.

Respectfully submitted,

CARL J. BATTER
910 Seventeenth Street, N. W.
Washington 6, D. C.
Attorney for the Petitioner

December 1949

INDEX

CITATIONS

848168—49

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 178

J. BAKER BRYAN, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the Court of Appeals, on reversal and remand for a new trial (R. 349–359) and on denial of petitioner's motion to amend the judgment (R. 365–366), are not yet reported.

JURISDICTION

The judgment of the Court of Appeals reversing and remanding for a new trial was entered May 13, 1949 (R. 360), and the order denying petitioner's motion to amend the judgment was entered June 10, 1949 (R. 367). The petition for

a writ of certiorari was filed July 8, 1949. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals, upon reversing a conviction on the ground that the evidence was insufficient to warrant submission of the case to the jury, is required to direct entry of a judgment of acquittal by the trial court.

STATUTE AND RULES INVOLVED

28 U. S. C.:

> Section 2106. DETERMINATION
>
> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Federal Rules of Criminal Procedure:

> Rule 29. MOTION FOR ACQUITTAL.
>
> (a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indict-

ment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 54. APPLICATION AND EXCEPTION.

(a) Courts and Commissioners.

(1) Courts. These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the Dis-

trict Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit courts of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Florida (R. 32-336), petitioner was convicted (R. 32, 337–339) on the last two counts of a four-count indictment (R. 1–4) charging willful attempted income-tax evasion as to the years, 1941, 1942, 1943, and 1944, respectively, and was sentenced to imprisonment for two years on count three and to pay a fine of $10,000 on count four (R. 337–339). The Court of Appeals for the Fifth Circuit, on May 13, 1949, reversed the conviction for insufficiency of the evidence and remanded the case for a new trial (R. 360), and thereafter, on June 10, 1949, denied (R. 367) petitioner's motion (R. 361–364) to amend the judgment of May 13 by directing the entry of a judgment of acquittal.

During the trial petitioner moved for a judgment of acquittal for the insufficiency of the evidence at the end of the Government's case and again at the end of the whole case, and in each

instance the court, without reserving opinion, denied the motion. (R. 309–310, 318–319.) Following the verdict (R. 32), petitioner renewed his motion for judgment of acquittal and in the alternative for a new trial (R. 18–21), which was also denied (R. 23).[1]

The Court of Appeals (one judge dissenting) was of the opinion that the Government has not established a prima facie case, since there was no evidence to exclude the possibility that certain expenditures relied upon as income might have come from funds accumulated in prior years (R. 356), and "thinking the defect in the evidence might be supplied on another trial directed that it be had" (R. 365).[2] Petitioner, by motion to amend the judgment, challenged the authority of the court to remand for a new trial under the circumstances (R. 361–364). The motion was denied (R. 367), the court considering its action fully sanctioned by Rule 29 (b), Federal Rules of

[1] At this time the trial court also denied petitioner's motion in arrest of judgment (R. 22), based, *inter alia*, on the fact that one of the jurors had been improperly excused before verdict, by consent of counsel and the court during the trial, without written stipulation as required by Rule 23 (b) of the Federal Rules of Criminal Procedure. This point was raised on the appeal (R. 339–340), but was not reached (R. 356).

[2] The Government considered the evidence sufficient to sustain the verdict, but the fact that the case was submitted to a jury of eleven without full compliance with the requirement of Rule 23 (b) was one of the factors which impelled the decision not to petition for a writ of certiorari.

Criminal Procedure, if applicable, and in any event by the provisions of 28 U. S. C., Section 2106 (R. 365–367).

DISCUSSION

Petitioner contends that when the Court of Appeals found the Government had not made out a prima facie case and that the case should not have been submitted to the jury, the appellate court was required to direct the trial court to enter a judgment of acquittal pursuant to the motion therefor made at the end of the whole case. (Pet. 4–5, 10–11.) He argues (Pet. 12–14) that such an order is expressly required by Rule 29 (a) of the Federal Rules of Criminal Procedure, *supra*, pp. 2–3, and that in any event remand for a new trial is not "appropriate" and "just" under the provisions of 28 U. S. C., Section 2106, *supra*, p. 2.

As the Court of Appeals pointed out (R. 366), Section 2106 empowers an appellate court, upon reversing a judgment, to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." The remanding of the cause, as was done here, for a new trial wherein "the defect in the evidence might be supplied" (R. 365) was thus, we believe, clearly authorized by the statute, and merely "leaves the Government free to retry the case or to dismiss it" if the

necessary additional evidence is not obtainable. *Caringella* v. *United States,* 78 F. 2d 563, 567 (C. A. 7th); *Collenger* v. *United States,* 50 F. 2d 345, 346 (C. A. 7th), certiorari denied, 284 U. S. 654. This Court has heretofore recognized the propriety in a criminal case of remanding for a new trial, upon reversal for lack of sufficient evidence to establish all essential elements of the crime charged. *Wiborg* v. *United States,* 163 U. S. 632; *Clyatt* v. *United States,* 197 U. S. 207. It can hardly be said, therefore, that the action of the Court of Appeals in this case, as measured by the authority conferred in Section 2106, was "contrary to law and an abuse of judicial discretion." (Br. 12.)

With respect to the argument that the specific language in Rule 29 (a) is controlling and that a Court of Appeals, when it finds a case should not have been submitted to the jury, must direct the entry of judgment of acquittal, it appears that the Court of Appeals for the Ninth Circuit reached this conclusion in *Karn* v. *United States,* 158 F. 2d 568, 573, and that the Third Circuit may have followed the same reasoning in *United States* v. *Johnson,* 165 F. 2d 42, 48, and in *United States* v. *Renee Ice Cream Co.,* 160 F. 2d 353, 357–358.[3]

[3] Other cases relied upon by petitioner are distinguishable. Thus the Seventh Circuit, in *United States* v. *Gardner,* 171 F. 2d 753, 759, ordered entry of judgment of acquittal as being the procedure "authorized by the Rules of Criminal Proce-

We believe this interpretation of the rule is too narrow. The Government should not be denied an opportunity to supply additional evidence, if obtainable, and thus conform the proof to the law of the case as established by the appellate court for the retrial.[4] Neither should the Government, in endeavoring to sustain a conviction in the Court of Appeals, be precluded from taking advantage of evidence introduced on behalf of a defendant who elected to put in his evidence after the trial court had denied his motion for the judgment of acquittal.[5] But such a limitation would be a consequence of the construction sought by petitioner and apparently adopted by the Third and Ninth Circuits.

CONCLUSION

For the reasons stated we believe the order of the Court of Appeals denying petitioner's motion to

---

dure for the District Courts." The Third Circuit in *Bozza* v. *United States*, 155 F. 2d 592, affirmed, 330 U. S. 160, ordered entry of judgment of acquittal as being "both just and practicable."

[4] That there was some basis for the Government's belief that a prima facie case had been made out is indicated by comparing the decision in the instant case with that of this Court in *United States* v. *Johnson*, 319 U. S. 503.

[5] The Court of Appeals for the Second Circuit recently affirmed a conviction on finding, in the evidence introduced by defendant, corroborating circumstances required to establish perjury, even though the Government's case in chief contained no such proof and defendant had made a timely motion for judgment of acquittal before calling his witness. *United States* v. *Goldstein*, 168 F. 2d 666. In that case the court refused to recognize an absolute right to judgment of acquittal as having matured at the end of the Government's case.

amend the previous judgment by ordering the entry of a judgment of acquittal was correct. However, since the Courts of Appeals for the Third and Ninth Circuits seem to have reached a different conclusion [6] and since an important question of federal appellate practice is involved, we do not oppose granting of the petition for a writ of certiorari.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
JAMES M. MCINERNEY,
ELLIS N. SLACK,
ANDREW F. OEHMANN,
Special Assistants to the Attorney General.

AUGUST, 1949.

[6] Although the Fifth Circuit in the instant case relied, in part, on the sanction in paragraph (b) of Rule 29, *supra*, we have not attempted to develop that point, since the effect of the decisions in the Third and Ninth Circuits is to make it immaterial whether the defendant properly challenges the sufficiency of the evidence at any time before appeal.

U. S. GOVERNMENT PRINTING OFFICE: 1949